TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 105.

EMORY E. NORTON, ASSIGNEE OF JOHN HEINN AND MARY HEINN, BANKRUPTS, PLAINTIFF IN ERROR,

vs.

EDGAR A. SWITZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 9, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 105.

EMORY E. NORTON, ASSIGNEE OF JOHN HEINN AND MARY HEINN, BANKRUPTS, PLAINTIFF IN ERROR,

VS.

EDGAR A. SWITZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

INDEX.

	Original.	Print.
Agreement	13	5
Answer	14	5
Answers, supplemental and amended	23	8
Agreement	48	18
Bill annexed to petition	4	2
Bond of appeal	48	18
Citation on John Heinn and others, and petition	19	7
E. E. Norton	42	15
Document citation and return on J. Heinn	6	3
Mrs. Heinn	7	3
exception of defendants	9	4
bond, (sheriff's)	10	4
"A," receipt of $400	35	13
Exception	21	8
dismissed	23	8
peremptory	32	12
continued	36	13
continued	36	13
submitted	37	14
maintained	38	14
Judgment	45	17
Motion to transfer bond	46	17
Note	19	7
Note of evidence	44	16
Order continuance	25	9
continuance	29	10
continuance	41	15
Petition, (original)	1	1
supplemental, and order	17	6

	Original.	Print.
Plea of payment	27	10
Petition for appeal and order	46	17
Rule to set aside provisional seizure and return	15	5
Rule to set aside provisional seizure dismissed	22	8
Rule for new trial and return	38	14
continued	39	14
to make E. E. Norton party to suit	41	15
Testimony of McQuen	28	10
E. A. Switzer	33	12
SUPREME COURT.		
Certificate	66	23
Extract from minutes	53	19
Extract from the minutes	56	20
Extract from the minutes	65	23
Opinion of the court	54	19
Petition for rehearing	57	20
Petition for writ of error	68	23
Bond	70	24
Writ of error	72	25
Citation	73	25

3111—Supreme court of La. Filed January 23d, 1871.
(Signed) M. P. JULIAN,
Depy. Clerk.

STATE OF LOUISIANA:

Fifth district court for the parish of Orleans.

Transcript.

E. A. SWITZER
vs.
ST'B'T FROLIC, AND MARY HEINN AND JOHN Heinn, owners, etc. } No. 16926.

Race, Foster & E. T. Merrick, and A. G. Brice, attys. for E. E. Norton, assignee & appellant.
B. Egan & E. N. Whittemore, attys. for appellee.

1 Filed under No. 2880 of 2d judicial dist. court, parish of Jefferson, Aug. 31st, 1866.

STATE OF LOUISIANA:

Fifth district court for the parish of Orleans.

Filed October 8th, 1870, 2d judicial dt. court. No. 3878.

Petition.—Filed December 13th, 1866.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, AND MARY HEINN and husband, John Heinn. } No. 16926.

To the honorable the second judicial district court in and for the parish of Jefferson:

The petition of Edgar Switzer, a resident of , respectfully represents:

That the st'b't Frolic, and owners, Mary Heinn and husband, John Heinn, residing in this State, are justly and truly indebted to your petitioner in the full sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, for services rendered as captain and superintendent of the repairing said steamboat Frolic from the 9th of December, 1865, to the 6th of March, 1866, say, two months and 27 days, at the rate of $300 per month, all of which will more fully appear by reference to the detail bill annexed and made part thereof.

Petitioner further represents that said boat is engaged in carrying freight and passengers for hire.

That he is a privileged creditor of said boat for the said sum of $870, with interest as aforesaid, and that said boat is on the eve of leaving the jurisdiction of this honorable court, and he is apprehensive of losing the amount of his said claim should said boat depart previous to the same being satisfied; petitioner further represents that the owners of
3 said boat have repeatedly promised to pay the amount of his said claim, yet have failed and neglect so to do.

Wherefore petitioner prays that, in consideration of the premises, the affidavit annexed, that a writ of provisional seizure do issue against the said st'b't Frolic, and that Mary Hienn & husband, John Hienn, owners of said boat, be cited to appear and answer this petition, and that after due proceedings had they be condemned in solido to pay petitioner the aforesaid sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, and with privilege on the st'b't Frolic, and all costs of suit; and petitioner prays for general relief.

(Signed) BENTINCK EGAN, *Atty.*

Affidavit.

E. A. Switzer, being duly sworn, doth depose and say, that the st'b't Frolic & owners, Mary Heinn and husband, John Heinn, are justly and truly indebted to affiant in the full sum of eight hundred &
4 seventy dollars for services rendered on said boat; that the same is really owing, and that said vessel is on the eve of leaving the jurisdiction of this honorable court, and he is apprehensive of losing the amount of his said claim should said boat depart previous to the same being satisfied, and that all the facts and allegations in the foregoing petition are true and correct.

(S'g'd) E. A. SWITZER.

Sworn to and subscribed before me this 31st Aug., A. D. 1866.

(S'g'd) CHAS. A. LAGROWE,
D'y Clerk.

Bill annexed to petition.—Filed Dec. 13th, 1866.

E. A. SWITZER
vs.
ST'B'T FROLIC AND OWNERS, ET AL. } No. 16926.

5 *St'b't Frolic and owners, Mary Heinn & husband, John Heinn. To E. A. Switzer, Dr.*

For services as captain and superintendent of the repairing of steamboat Frolic from 9th March, 1865, to 6th of March, 1866, say, 2 months and 27 days, at $300.00 per month.....	$870 00

Order annexed to petition.

Let, as prayed for, a writ of provisional seizure issue according to law.

Parish of Jefferson, Aug. 31st, 1866.

(S'g'd) ROBT. MORRIS, *Clerk.*

Order annexed to petition.

It is ordered that the amount of the bond to release the property seized be fixed at fifteen hundred dollars.

Parish of Jefferson, September 4th, 1866.

(S'g'd) ROBT. MORRIS, *Clerk.*

6 *Document annexed to and filed with petition, being citation of the second judicial district court on Mr. John Heinn, parish of Jefferson.*

E. A. SWITZER
vs.
ST'B'T FROLIC AND OWNERS, AND MARY HEINN & husband. } No. 16926.

The State of Louisiana, parish of Jefferson, second judicial district court.

E. A. SWITZER
vs.
S'TB'T FROLIC, MARY HEINN AND HUSBAND, John Heinn, owners. } No. 2880.

Mr. John Heinn, owner of st'b't Frolic:

You are hereby summoned to comply with the demands contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second judicial
7 district court, in the parish of Jefferson, in ten days after the service hereof.

Witness the honorable A. Cazabat, judge of the said court, this 1st day of September, in the year of our Lord 1866.

(S'g'd) ROBT. MORRIS, *Clerk.*

Sheriff's return.

Received September 1st, 1866, and on the 4th day of September, 1866, served a certified copy of the within cit. and accompanying petition of defendant John Heinn, in person.

Ret. same day, month, and year.

(S'g'd) E. R. CHEVALLY,
D'y Shff.

Document annexed to and filed with petition, being citation of the second judicial district court of the parish of Jefferson on Mrs. Mary Heinn.

8 E. A. SWITZER
vs.
ST'B'T FROLIC AND OWNERS, AND MARY HEINN & husband. } No. 16926.

The State of Louisiana, parish of Jefferson, second judicial district court.

Mrs. Mary Heinn, owner of the st'b't Frolic:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second judicial district court, in the parish of Jefferson, in ten days after the service thereof.

Witness the honorable A. Cazabat, judge of the said court, this 1st day of September, in the year of our Lord 1866.

(S'g'd) ROBT. MORRIS, *Clerk.*

Sheriff's return.

9 Received September 1st, 1866, and on the 4th day of same month and year served a certified copy of the within citation and accompanying petition on the defendant Mary Heinn, in person.

Ret. same day, month, and year.

(S'g'd) E. B. CHEVALLY,
D'y Sheriff.

Document annexed to and filed with petition, being exception in the second judicial district court, parish of Jefferson, (exception of defts.)

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, AND MARY HEINN ET ALS. } No. 16926.

2d jud. dist. court.

Now come into court Mary Hein and John Hein, defts. in this suit, and plead to the jurisdiction of this court, because these de-
10 fendants reside in the parish and city of New Orleans, and out of the jurisdiction of this court, and the proceedings instituted in this court are not proceedings in rem, but proceedings against the persons of these defts., and against whom a personal judgment is prayed for.

2d. They except and say that plaintiff cannot proceed by provisional seizure, because the services for which he claims payment *does* not arise whilst the steamer Frolic was navigating within the State or trading within the State, but at a time when she was not navigating or trading within the State.

That the provisional seizure is allowed only to parties who have rendered services trading or navigating within the State. (Art. 285 & 289, C. P.)

Prays to be hence dismissed with costs.

(S'g'd) M. GRIVOT,
Attys. for Petrs.

11 *Document, being bond annexed to and filed with petition of the second judicial district court, parish of Jefferson.*

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET ALS. } No. 16926.

Know all men that we, John Heinn and F. C. Zeller, are held unto S. Kerner, sheriff of the parish of Jefferson, in the State of Louisiana, in the penal sum of fifteen hundred dollars, for the payment whereof to the said S. Kerner, his executors, administrators, or assigns, we jointly and severally bind ourselves, our heirs, executors, and administrators, respectively, by these presents; as witness our respective names hereunto affixed, parish of Jefferson, this 4th day of September, in the year eighteen hundred and sixty-six.

Whereas, in and by virtue of a writ of provisional seizure,
12 issued out of the honorable the 2d judicial district court of Louisiana, at the suit of E. A. Switzer vs. St'b't Frolic and owners, John Hein and Mary Hein, and numbered 2880 on the docket of the said court, and which suit is now pending therein, the following described

property, to wit, the steamboat Frolic, has been seized and taken into the custody of the said sheriff, and detained according to law; but the same has been released and delivered to the defendants by order of court upon the appearance of the defendants in the said suit, and delivering to the said sheriff the present obligation. The condition of which is such that if the said defendants shall not send the above-described property out of the jurisdiction of the court, and that he will faith-
13 fully present the same in case he should be decreed to restore the same to the plaintiff, and shall satisfy such judgment as may be rendered in the suit pending as above mentioned, then this obligation to be void; or else remain in full force.

(S'g'd) J. HIENN.
" F. C. ZELLER.

Signed and delivered in presence of—

E. B. CHEVALLY.

Agreement.—Filed Dec. 13th, 1866.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET ALS. } No. 16926.

2d judicial district court, parish of Jefferson.

We hereby consent that the above cause be transferred to the honorable fifth district court of New Orleans, to be there proceeded with according to law and as if the same had been filed in said court in the first instance.

(S'g'd) BENTINCK EGAN,
Attys. for Plff.

14 (S'g'd) M. GRIVOT,
Atty. for Defts.

Answer.—Filed Dec. 17th, 1866.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

Fifth district court.

Now comes defendants in this suit, and for answer deny all and singular plaintiff's allegations, and deny that Jno. Heinn was ever owner of said boat, and further deny that plaintiff has any privilege on said boat for any work or services or that he ever rendered services as charged, and require strict proof in regard thereto.

Pray judgment in their favor for costs.

(S'g'd) M. GRIVOT,
Attorney for Defendants.

Rule to set aside provisional seizure.—Filed Dec. 17, '66.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

5th district court.

On motion of M. Grivot, of counsel for defendants in this case, ordered

that plaintiffs show cause Wednesday, January 9th inst., at 11 o'cl'k a. m., why the provisional seizure issued in this case should not be set aside on the following ground:

1°. That plaintiff according to his own showing has no privilege. That at the time *of* the alleged services, as he states, were being rendered, the st'b't Frolic was not navigating or trading within or without the State, and therefore no provisional seizure can issue against said st'boat; the arts. 285 and 289, C. P., being imperative.

16 2°. That if the plaintiff be entitled to the writ of provisional seizure, he is only entitled to it for a claim within the six months previous to the application for said , and not for any sum beyond or anterior to the six months.

3d. That he claims from the 9th December, 1865, to the 6th March, 1866, for services rendered during that time, and he brings suit on the 31st August, 1866. Therefore his privilege, if he had any, could not be for more than one month's services, and therefore the writ issued erroneously for more.

Sheriff's return.

Received December 20, 1866, and on the 21st day of the same month and year served a copy of the within rule to B. Egan, esq., personally.
Re't'd same day.

(S'g'd) F. B. HERNANDEZ,
D'y Sh'ff.

17 *Supplemental petition.—Filed Dec.* 26, 1866.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

To the honorable the fifth district court, parish of Orleans:

The supplemental and amended petition of A. E. Switzer, plaintiff in the above cause, respectfully represents:

That petitioner omitted to state in his original petition that one of the defendants in the above suit, John Heinn, and who acts as the agent and manage' of the business of the boat, had given petitioner a note, payable four months after date, for the sum of eight hundred and seventy dollars, dated on the 6th of March, 1866, as an acknowledgment of his services as captain and superintendant the repairs of the

18 steamboat Frolic, as stated more fully in his bill annexed to the original petitione*r* in this cause, and that he is now desirous of filing said note, and making it part of his original and this supplemental petition.

Wherefore petitioner prays that this supplemental petition and note be filed, and that John Hienn and wife, Mary Hienn, be cited to appear and answer, and that, after due proceedings had, they be condemned in solido to pay petitioner the said sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, and with privilege on the st'b't Frolic, and all costs of suit; and petitioner prays for general relief.

(S'g'd) BENTINCK EGAN, *Atty.*

Order.

19 Let this supplemental petition be filed as within prayed for, and according to law.
New Orleans, December 26, '66.
(S'g'd) PAUL E. THÉARD,
Acting for Judge Leaumont, 5th Dist. Court.

Note.—Filed Dec. 26, '66, and annexed to sup. petition.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, &C., ET ALS. } No. 16926.

$870.] NEW ORLEANS, *March 6th*, 1866.

Four months after date I promise to pay to E. A. Switzer, or bearer, the sum of eight hundred and seventy dollars for value received.
(S'g'd) J. HIENN.

[50 cts. int.-rev. stamp.]
[20 cts. int.-rev. stamp.]

Citation.—December 27th, 1866.

20 E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET ALS. } No. 16926.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

Mr. John Heinn and wife, Mary Heinn:

You are hereby summoned to comply with the demand contained in the supplemental petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans, in ten days after the service hereof.

Witness the honorable Charles Leaumont, judge of the said court, the 27th day of December, in the year of our Lord 1866.
(S'g'd) F. A. LUMINAIS,
Deputy Clerk.

21 *Sheriff's return.*

Received December 27th, 1866, and on the 31st same month and year served copy of within citation and accompanying supplemental petition on John Heinn and wife by leaving the same at his domicile, No. 386 Annunciation street, in the hands of Josephine Corolin, a person apparently above the age of 14 year', living and residing in said domicile, defendants being absent at the time of said service.
Returned same day.
(S'g'd) L. E. GARDETTE,
D'y Shff.

Exception of defendants.—Filed Jan. 5th, 1867.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

5th district court.

22 Now comes the defendants in this suit and except to the supplemental petition of plaintiff, because the same alters the demand and makes it a different one from that of the original petition, and shows that plaintiff's claim, as stated in the original petition, has been narated by the taking of a note, and that plaintiff cannot amend but must either proceed with his original action, or dismiss the same.

Wherefore p'ays that the supplemental and amended petition be dismissed; and as in duty bound, &c.

(S'g'd) M. GRIVOT,
Of Counsel.

Rule to set aside provisional seizure dismissed, January 9th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC AND OWNER ET ALS. } No. 16926.

23 The rule taken in this case by defendants to show cause why the seizure (provisional) issued herein should not be set aside was by consent of parties ordered to be dismissed.

Exception dismissed, Jan. 26, 67.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

The exception in this case came on this day for trial.

B. Egan, for plaintiff.

M. Grivot, for defendants.

After hearing counsel, the court, considering the law to be in favor of plaintiff, it is ordered that said exception be dismissed.

24 *Supplemental and amended answer of John Heinn.—Filed Jan. 28, 1867.*

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

5th district court.

Defendant, John Heinn, for separate answer to original and supplemental petition, says that he denies being the owner of the st'b't

Frolic, or that the note annexed was given as an evidence of debt, and says that it was given as a *nar*ation of the premature debt, and which plaintiff accepted.

Prays judgment in his favor.

(S'g'd) M. GRIVOT,
Atty. for Plff.

Supplemental and amended answer of Mrs. Mary Heinn.—Filed Jan. 28th, 1867.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ETC., ET ALS. } No. 16926.

25 5th district court.

Now comes Mrs. Mary Heinn, one of the defendants in this suit, who, for supplemental and amended answer to the plaintiff's original petition and answer to the supplemental petition, says that she denies being indebted as charged or that the note annexed to the supplemental petition was given as an evidence of debt, but aver' that said note was given by said John Heinn to the plff. as a novation and in payment of the original debt, and which plaintiff acknowledge' to have received.

Wherefore defendant pleads novation of the original debt, and prays to be hence dismissed with costs.

And, as in duty bound.

(S'g'd) M. GRIVOT,
Atty. for. Deft.

Order, continuance.—Febr'y 18th, 1867.

Extract from minutes.

26 E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

This cause, fixed for this day, was on motion ordered to be continued regularly, counsel for plaintiff being absent.

Order, continuance.—March 25th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

This case, fixed for this day, was ordered to be continued, with preference, for want of time.

Order, continuance—April 8th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

This case, fixed for this day, was called and ordered to be continued, with preference.

27 Witness' being absent, it is further ordered that attachments issue for absent witnesses, returnable on Monday, 29th inst., at 11 a. m.

Plea of payment.—Filed April 22, '67.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

Defendant, Mrs. Mary Heinn, herein pleads payment of any claim plaintiff may have made out against her, the sum of four hundred dollars, as per receipt hereto annexed.

(S'g'd) M. GRIVOT,
For Deft. Mrs. Heinn.

Testimony of Mr. R. P. McQuen.—Filed April 22, '67.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

5th district court.

Plaintiff offers in evidence the note sued, on file 26th Dec., '66.

28 R. P. MCQUEN, for plaintiff, says:

I am acquainted with the parties to his suit, Capt. Switzer and Capt. Hienn.

I was employed on the steamer Frolic as engineer; Capt. Heinn and Capt. Switzer both employed me. I was employed on her from some time in December until July. Capt. Switzer was acting on the boat as superintendent; he gave orders, made bills, and paid me my money up to the last February. He was not on the boat all the time. I was. He went ashore about 1st March. I did not leave the boat till about 25th July. I am not positive about the exact date.

During the time Switzer was on her the boat was being repaired. I don't think Captain Heinn directed the repairs. Capt. Heinn would come to the boat occasionally and look about. I don't know the tenor of his conversations with Captain Switzer.

All the conversation I heard between them was Capt. Heinn said the boat would make a good boat but cost a heap of money. Capt. Switzer came on the boat about the same time I did *I did.* I am not positive time he came on, however; he may have come on earlier than December.

I did not charge my memory with either time Switzer paid me my money. I don't recollect exactly what he paid me.

My salary was $200.00 per month. I should think he paid me as much as $300.00, I don't know the amount, however. The 2d engineer, and 2 strikers, and some other laborers, I think he also paid, but he did not pay them the full amount.

Order, continuance.—April 22*d*, 1867.

Extract from minutes.

E. A. SWITZER.
vs.
ST'B'T FROLIC & OWNERS, ET ALS. } No. 16926.

30 This case came on this day.
B. Egan, for plaintiff.

M. Grivot, for defendants.

After hearing pleadings, testimony, and counsel,

Ordered that the further hearing of the case be continued, with preference.

Order, continuance.—May 6, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, &C., ET ALS. } No. 16926.

This cause, fixed for this day, was ordered to be continued, with preference, on account of sickness in the family of minute-clerk of this court.

Order, continuance.—May 20th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

31 This case, fixed for this day, was ordered to be continued, with preference, M. Grivot, of counsel, being sick, and absent.

Order, continuance.—June 3d, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

This case, fixed for this day, was called, and witnesses being absent, it is ordered that the same be continued till Monday the 10th inst., and attachments issue for the absent witnesses, returnable on Monday, the 10th inst., at 11 a. m.

Order, continuance.—June 10th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

32 This case, fixed for this day, came on and was ordered to be continued to Monday, 17th inst., at 11 a. m., witnesses being absent, and further ordered the attachments issue for said witnesses, returnable at that time.

Peremptory exception.—Filed June 11th, 1867.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

5th district court.

Now comes the defendants, and for peremptory exception, pleads that this suit is against a st'boat, and that the U. S. district court, setting in admiralty, has exclusive jurisdiction of such cases.

Prays hence to be dismissed with costs.

(S'g'd) M. GRIVOT,
Atty. for Defts.

Order, continuance.—June 17th, 1867.

Extract from minutes.

33 E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

This case, fixed for this day, was ordered to be continued, with preference, to the next November term, counsel for plaintiff being absent from the city.

Testimony of E. A. Switzer.—Filed Nov. 9, 1867.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

Testimony of E. A. SWITZER, taken by order of court in the clerk's office:

I am the plaintiff in this suit. I reside in St. Louis. I arrived here on Thursday night last.

I came down for the express purpose of attending to this suit. I have no other business here. I expect to leave when this thing is settled. I will not remain until the 18th inst. I cannot now get away
34 before Monday.

The bill annexed to my petition in this suit is correct in dates and amounts; it is for my services for superintending the repairing of the steamboat Frolic. Capt. John Heinn, one of the defendants, employed me at $300 per month; he first employed me at Cairo as captain of a boat bought at that place—this was the Iatan. This took place about 18th of August, 1865, I think. I brought this boat down to this city and, shortly afterwards, went on the st'b't Frolic at the request of Capt. John Heinn; the Frolic was then laying at the wharf. I took her from there to the dock, on the other side of the river, where she continued undergoing extensive repairs, where she until near the 6th of March, 1866. The receipt marked "A" is correct. I received the money, $400, therein mentioned on the 28th of February,
35 1866, from Captain John Heinn. After that we had a settlement and there was found to be due me $870; in acknowledgment of

which Capt. John Heinn gave me the note marked "B" for the balance due me for my services on the st'b't Frolic; the receipt for $400 is on account of my services on the st'b't Frolic.

No cross-examination.

(S'g'd) M. GRIVOT,
Atty. at Law.

(S'g'd) E. A. SWITZER.

Sworn to and subscribed before me on this 9th November, 1867.

(S'g'd) F. A. WOOLFLEY, *Clerk.*

Document A, being receipt mentioned in foregoing testimony of E. A. Switzer.—Filed 22d April, '67.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

A.

36 $400.00.

Received, New Orleans, February 28th, 1866, of Capt. John Hienn, the sum of four hundred dollars on account of wages.

(S'g'd) E. A. SWITZER.

Exception continued Nov. 9th, 1867.—Extract from minutes. No. 16926.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET ALS. } No. 16926.

The exception filed in this matter, fixed for this day, came on.

B. Egan, for plaintiff.

M. Grivot, for defendants.

After hearing counsel, ordered that said exception be continued to Monday, the 18th inst., at 11 a. m., to be then tried, together with the merits of the case, and that plaintiff have to take testimony in clerk's office by leave of court.

Exception continued.—Nov. 18th, 1867.

37 Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ETC., ET ALS. } No. 16926.

The exception in this case, fixed for this day, was ordered to be continued to Thursday, 26th inst., at 11 a. m.

Exception continued—November 26th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET AL. } No. 16926.

The exceptions herein, fixed for this day, *was* ordered to be continued to Friday, 6th December, prox., for want of time.

Exception submitted—Dec. 6th, '67.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET ALS. } No. 16926.

38 The exceptions in this case *was* submitted, and the court took the same under advisement.

Exception maintained—Dec. 24th, 1867.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, & ALS. } No. 16926.

In the matter of the exceptions herein, the court, after deliberation, considering the law to be in favor of defendants, it is ordered that the exceptions be maintained.

Rule for new trial.—Filed Jan. 13th, 1868.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, & ALS. } No. 16926.

5th d't court.

39 On motion of B. Egan, attorney for plff., it is ordered by the court that defendants do show cause, Monday 20th January, 1868, why a new trial should not be granted in the above cause, on the ground that the judgment is contrary to the law and the evidence on file, and on the further ground that this court has jurisdiction of this suit.

Sheriff's return.

Received January 15th, 1868, and on the same day, month, and year served a copy of the within rule on defendant, through his attorney, M. Grivot, esq., personally.
Returned same day.
(S'g'd) F. B. HERNANDEZ, *D'y Sheriff.*

Rule for new trial continued.—Jan. 20th, 1868.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS ET AL. } No. 16926.

40 The rule taken in this case, fixed for this day, was, on motion of B. Egan, of counsel, ordered to be continued till Wednesday, the 29th inst., at 11 a. m.

Rule for new trial continued. Jan. 29th, 1868.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, ET ALS. } No. 16926.

The rule in this case, fixed for this day, was ordered to be continued to Febr'y 7th, inst.

Rule for new trial continued.—Febr'y 7th, 1868.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ET ALS. } No. 16926.

The rule in this case, fixed for this day, was ordered to be continued to Thursday, 20th inst., at 11 a. m., not having been reached for want of time.

41 *Rule for new trial continued.—Febr'y 20th*, 1868.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ET ALS. } No. 16926.

On motion of B. Egan, of counsel, it is ordered that the rule in this case be continued indefinitely.

Order, continuance.—March 25th, 1870.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, ET ALS. } No. 16926.

This cause is continued by preference.

Motion to make E. E. Norton, esq., assignee, a party to this suit.—Filed April 7th, 1870.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, ET ALS. } No. 16926.

5th district court.

42 On motion of B. Egan, atty. for plaintiff in the above cause, and on suggesting to the court that, since the institution of this suit, Mrs. Heinn and her husband, John Heinn, the defendants, have taken the benefit of the United States bankrupt act, and that E. E. Norton, esq., was appointed and qualified as their assignee,

Therefore it is ordered by the court, that E. E. Norton, esq., assignee of said defts., be made a party to this suit, in his capacity aforesaid, in place and stead of defts.

Sheriff's return.

Received, April 8th, 1870, and on the ninth day of the same month and year, served copy of within motion on E. E. Norton, assignee, &c., in person.
Ret. same day.
(S'g'd) P. AD. FORTIER, *Dy. Sheriff.*

Citation on E. E. Norton, assignee.—April 8th, 1870.

43 E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ET ALS. } No. 16926.

State of Louisiana, fifth district court for the parish of Orleans, in the city of New Orleans.

Mr. E. E. NORTON, of N. O., assignee, &c.:
You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court for the parish of Orleans within ten days after the service hereof.
Witness the honorable Charles Leaumont, judge of the said court, this 8th day of April, in the year of our Lord 1870.
(S'g'd) F. A. LUMINAIS, *Dy. Clerk.*

Sheriff's return.

44 Received, April 8th, 1870, and on the ninth day of the same month and year served copy of within citation and accompanying petition on E. E. Norton, assignee, &c., in person.
Ret. same day.
(S'g'd) P. AD. FORTIER, *Dy. Sheriff*

Order, continuance.—April 8th, 1870.

Extract from minutes.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

This cause is continued by preference.

Note of evidence.—Filed April 22, '70.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ET ALS., ETC. } No. 16926.

Plaintiff offers in evidence the note sued on, the testimony of E. A Switzer, filed Nov. 9th, 1867, also testimony filed April 27th, 1867.

45 *Judgment.—April 22d, 1870.*

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS &C., ET ALS. } No. 16926.

This cause came on this day for trial.

B. Egan, for plaintiff; E. E. Norton, assignee of Mary Heinn and her husband, John Heinn, the defendants, absent and not represented.

When, after hearing evidence, the law and evidence being in favor of plaintiff,

It is ordered, adjudged, and decreed, that the plaintiff, E. A. Switzer, recover of E. E. Norton, assignee of the defendants, Mary Hienn and her husband, John Heinn, the sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, until paid, and costs of suit, with privilege on the st'b't Frolic.

Judgment rendered April 22d, 1870.

Signed April 28th, 1870.

(S'g'ed) CHAS. LEAUMONT, *Judg.*

46 *Motion to transfer bond.—Filed April 22, 1870.*

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, ETC., ET ALS. } No. 16926.

Fifth district court for the parish of Orleans.

On motion of B. Egan and E. N. Whittemore, attorneys for plaintiff, and on suggesting to the court that since the execution of the bond given in above cause, in favor of E. Kerner, sheriff of the parish of Jefferson, for the release of the steamboat Frolic from a provisional seizure, the said sheriff has died:

Therefore, it is ordered by the court, that said bond be transferred to plaintiff by the present successor in office of said Sheriff Kerner.

Petition for devolutive appeal.—Filed Dec. 15th, 1870.

E. A. SWITZER
vs.
ST'B'T FROLIC, OWNERS, &C., ET ALS. } No. 16926.

47 Hon. the fifth district court for the parish of Orleans.

The petition of E. E. Norton, assignee of Mr. & Mrs. Heinn *& wife*, respectfully represents that a judgment has been rendered in the above case, as assignee of said parties, defendants in bankruptcy; that he is informed and believes that there is error in the judgment, to his prejudice, and that he is desirous of taking a devolutive appeal therefrom:

Wherefore petitioner prays that a devolutive appeal be granted to petitioner, returnable 1st Monday of January, 1871, on said Norton giving bond for costs in the sum of one hundred and fifty dollars, and that said Switzer be notified hereof, and all parties interested therein, and for general relief.

(S'g'd) RACE, FOSTER, & E. T. MERRICK,
" A. G. BRICE,
Attys. for E. E. Norton, Assignee.

48 *Order.*

Let a devolutive appeal be granted herein as prayed for, and according to law, upon appellant furnishing bond, with good and solvent security, in the sum of one hundred and fifty dollars, conditioned as the law directs, returnable to the supreme court of Louisiana on the first Monday of January, 1871.

New Orleans, December 15th, 1870.

(S'g'd) CHAS. LEAUMONT, *Judge.*

Agreement.

We hereby agree that the return-day be extended until Monday, 16th January, 1871.

Service accepted for Switzer.

(S'g'd) B. EGAN & E. W. WHITTEMORE,
Attys. for Switzer.

Bond of appeal.—Filed Dec. 23, '70.

E. A. SWITZER
vs. } No. 16926.
ST'B'T FROLIC, OWNERS, &C., ET ALS.

49 Know all men by these presents that we, E. E. Norton, assignee, as principal, and Joseph Miller, as surety, are held firmly bound unto the clerk of the fifth district court for the parish of Orleans, Louis Power, his executors, administrators, and assigns, in the sum of one hundred and fifty dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated in the city of New Orleans on this fifteen' day of December, in the year of our Lord one thousand eight hundred and seventy.

Whereas the above bounden, E. E. Norton, assignee, this day filed a petition of appeal from a final judgment rendered against him as assignee in the suit of E. A. Switzer vs. St'b't Frolic and owners, &c., No. 16926 in the fifth district court for the parish of Orleans, on
50 the 22d day of April, 1870:

Now, the condition of the above obligation is such that the above bound E. E. Norton, assignee, shall prosecute this appeal, and shall satisfy whatever judgment may be rendered against him or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal, otherwise that the said Joseph Miller, surety, shall be liable in his place.

(S'g'd) E. E. NORTON, [L. S.]
Assignee.

(S'g'd) JOSEPH MILLER. [L. S.]

Signed, sealed, and delivered in presence of—
LOUIS A. RICHARDS.

Clerk's certificate.

State of Louisiana, fifth district court for the parish of Orleans.

51 I, Louis Power, clerk of the fifth district court for the parish

of Orleans, and as such duly commissioned and sworn, do hereby certify that the foregoing fifty-nine (59) pages contain a true and correct transcript of all the proceedings had, testimony and evidence adduced, and all the documents filed upon the trial of the cause wherein E. A. Switzer is plaintiff and the steamboat Frolic and owners, Mrs. Mary Heinn and husband, John Heinn, are the defendants, the same being numbered No. 16926 now of the docket of the fifth district court for the parish of Orleans, late the fifth district court of New Orleans.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of our said court, at the city of New Orleans, this twenty-first day of January, in the year of our Lord one thousand
52 eight hundred and seventy, and the ninety-fifth year of the Independence of the United States of America.

[SEAL] (S'g'd) LOUIS POWER, *Clerk.*

53 Supreme court.

Extract from the minutes.

MONDAY, MARCH 23, 1874.

The court was duly opened pursuant to adjournment.

Present their honors John T. Ludeling, chief-justice, and James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

E. A. SWITZER
vs.
ST'B'T FROLIC, MARY HEINN & HUSB., *and* John Heinn, owners, &c. } No. 3111.

This case was called for trial, and having heard argument from E. N. Whittemore, esq., of counsel for plaintiff and appellee herein,

The court took said case under advisement upon the brief for appellee and the papers now on file.

54 *Opinion.*

Filed April 6, 1874.
(Signed) M. P. JULIAN,
Depy. Clerk.

E. A. SWITZER
vs.
JOHN HEIN & MARY HEINN, OWNERS OF steamboat Frolic. } No. 3111.

Mr. JUSTICE WYLY: The plaintiff sued the defendants for his wages as captain of the steamboat Frolic, and provisionally seized the vessel, which was afterwards released on bond.

The defendants were subsequently adjudged bankrupts and their assignee was made party, contradictorily with whom this case was tried, and judgment rendered in favor of plaintiff for the amount of his claim, $870.00.

The assignee has appealed.

This is a personal action against the owners. The vessel being seized to enforce the lien accorded by article 3204 R. 6, under the con-
55 servatory remedy of provisional seizure, C. P. 285, 289.

It is not a proceeding in rem to enforce a maritime lien; there-

fore there is no force in the objection that the State court was without jurisdiction. (Lew. vs. Galceran, 11 Wal., 185.)

It is contended, however, that the decree of bankruptcy divested the court of jurisdiction, and that it had no authority to proceed to trial and render judgment against the assignee; that the plaintiff should have gone into the bankrupt court to enforce his claim.

The State court having obtained lawful jurisdiction over the parties and subject-matter, could not be divested thereof by the bankrupt court.

"Congress could, no doubt, have made an adjudication in bankruptcy operate proprio vigore to transfer all causes which should be pending in their courts at the time of the filing of the petition and to which
56 the bankrupt should be a party from those tribunals into the court of bankruptcy. It has not, however, done so. It not only has not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defence in those courts by the assignee. This principle applies not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute or remains unascertained." (Bump's Law and Practice of Bankruptcy, sixth edition, pages 187, 198, 199, and authorities there cited.)

The demand of the plaintiff is fully established by the evidence in the record.

Judg't affirmed.

Extract from the minutes.

MONDAY, *April 6th*, 1874.

The court was duly opened, pursuant to adjournment.

57 Present, their honors John T. Ludeling, chief-justice, and James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

E. A. SWITZER
vs.
ST'B'T FROLIC, AND MARY HEINN AND JOHN Heinn, owners, &c. } No. 3111.

Appeal from the 5th district court for the parish of Orleans.
Judgment affirmed.

Petition for a rehearing.

Filed April 20, 1874.
(Signed) M. P. JULIAN,
Depy. Clerk.

E. A. SWITZER
vs.
STEAMBOAT FROLIC AND OWNERS. } No. 3111.

To the honorable the supreme court of La.:

58 The petition of Emory E. Norton, assignee of Mary Hein and John Hein, her husband, bankrupts, respectfully represents that your honorable court has fallen into an error in the judgment rendered against him in the above-entitled cause, by which he feels aggrieved and he prays a rehearing in this case on the following grounds:

1st. The brief and argument of the plaintiff's counsel has evidently led the court into error, an accident having prevented a reply by defendants' counsel to the brief and argument.

2d. The cause was in no condition to be tried on its merits, and the plaintiff's counsel (as is apparent from the record) had led the court into error in his assertion (p. 3 of his brief) that a new trial had been granted in the lower court. The record shows the contra of the assertion to be true, and that the motion for a new trial was indefinitely postponed at the instance of plaintiff's counsel. (See judgment on exception, p. 44.)

59 "On motion of B. Egan, of counsel, it is ordered that the rule in this case be continued indefinitely." (Pages 47, 48.) No other order was made. This rule could not afterwards be taken up again without doing it contradictorily with the parties. If Hein and wife were bankrupts, they were entitled to be heard, as the judgment discharged them as well as disposed of and ended the cause, and they, of all the persons in the world, were entitled to be heard on a point so vital to them. So the rule was not again taken up.

As the judgment was in bar of the action, the suit could not be proceeded in contradictorily with the third party to be cited in, after such judgment, until a new trial had been granted. Citation of authority on this point seems needless. (C. P. 548, 556.)

3d. The suggestion of plaintiff, on pages 48 and 49 of the record, shows that said Mary Hein and her husband, John Hein, had taken the benefit of the so-called bankrupt acts of the United States, and

60 allege the appointment of petitioner herein as their assignee, and it appears from the record that a citation was served on your petitioner, on the 8th day of April, 1870, commanding him to answer the petition in ten days thereafter. (Pages 50–51.) It also appears that said cause had been previously fixed for trial for the same day. Yet, wholly disregarding the law in such case, and without waiting for an answer or forming a contestatio litis by a default, and with a judgment still standing dismissing the action, plaintiff in the absence of your petitioner proceeded to take judgment (also erroneous in other particulars) against this defendant on illegal testimony.

For after the filing of the peremptory exception on the 11th day of June, 1867, (p. 37,) which is sustained by the decree rendered December 24, 1867, (p. 44,) and which has been confessed by the plaintiff in his amendment April 7, 1870, (p. 48–49,) the defendants, Hein and wife,

61 and their counsel, had no power or authority under the laws of the United States to consent to the taking of the testimony of E. A. Switzer, to be used against your petitioner or the creditors of said bankrupts in any other form or manner than is prescribed by the bankrupt acts and the rules prescribed by the Supreme Court of the United States under the same.

And the said trial of this cause a second time, and the rendition of a judgment against your petitioners in his absence, without an answer or judgment by default, and the use of said illegal and unauthorized statements of said E. A. Switzer as evidence, were error. (Brown vs. Brown, 21 Ann., 461; Caldwell vs. Ides, 2 L. R., 130; Allain vs. Preston, 2 L. R., 392; Allain vs. Preston, 4 L. R., 13.

The bringing in of a new party in another right is clearly a material amendment and within the above authorities.

4. Because the judgment rendered against your petitioner in the

62 form and in substance as rendered is against the acts of Congress of the United States in such case made and provided.

That the mode in which demands for money shall be enforced against bankrupts having been provided by said acts of Congress and the said rules of the bankrupt courts of the United States, the said judgment of the fifth district court of the parish of Orleans violates said acts of Congress of the United States, and is against and infringes the authority of your petitioner, exercised under and by virtue of said acts of Congress, and no judgment for money, for any cause set forth in the petition, under said acts of Congress, can be rendered against your petitioner, and no cause of action has been shown against him, and said court is without jurisdiction over him as assignee. (See Bump., 6 ed., pages 158, 438; bankrupt act, secs. 1 and 2, and especially section 21.)

63 The decisions under the insolvent law have always been held to preclude a continuance of and prosecution of any suit against the syndic. (Cox vs. Boringue, 4 Martin, 264; Fabre vs. McRae, 14 Ann., 648, and authorities there cited.)

5th. Because said judgment appealed from also violates said acts of Congress in decreeing a privilege upon said steamboat Frolic as though the same were in the hands of your petitioner as such assignee of said bankrupt; and whilst your petitioner exercises his rights and duties solely over such property as is transferred to him by the force of the act of Congress and the decrees of the bankrupt court, no judgment can lawfully be rendered against him for property which was never in his possession nor under his control.

6th. Because the writ of provisional seizure, which is allowed without bond, was improvidently sued out.

64 That the writ of provisional seizure is only allowed in cases where vessels are actually navigating within the State, and to enable sailors in such case to have the same remedy as in admiralty. The services sued for, which might have been better rendered by a ship's carpenter, having been rendered while the ship was undergoing repairs, did not come within the purview of No. 3, art. 285, of the Code of Practice, which is stricti juris, but the plaintiff, if he had any rights, was oblige' to sue out a writ of sequestration and give bond, as was done in Leon vs. Galceran, reported in 11 Wallace Rep., 189. (Roquest vs. Clarke, 12 Ann.,300; Dejona vs. Steamboat Osceola, 17 Ann., 277.)

7th. Because the plaintiff had clearly lost his privilege by the lapse of time and by taking a note and giving time.

Blanchin vs. Steamer Fashion, 10 A., 49; Van Wikle vs. Steamer Belle Gates, 12 A., 270; Succession of Broderick, 12 A., 521; Levistones vs. Haneville, 11 A., 702. "Parties who sell supplies to a steamboat on time longer than sixty days virtually abandon their privilege, and will

65 be regarded as ordinary creditors." (Syllabus, Violett vs. Fairchild, 6 A., 193.) Wherefore, and in order that the important errors into which the court was led by the erroneous arguments and statements of plaintiff's counsel, and in order that the acts of Congress may be rightly construed, and justice may be done in this case, defendant prays for a rehearing.

(Signed) A. G. BRICE,
RACE, FOSTER, & E. T. MERRICK,
Attorneys for Assignee and Petitioner.

Extract from the minutes.

WEDNESDAY, *May 27th*, 1874.

The court was duly opened.

Present their honors John T. Ludeling, chief-justice, and James G.

Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morga', associate justices.

E. H. SWITZER
vs.
ST'B'T FROLIC & MARY HEINN & JOHN HEINN, owners, &c. } No. 3111.

66 It is ordered that the rehearing applied for in this case be refused.

Certificate.

I, M. P. Julian, dy. clk. of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do hereby certify that the foregoing sixty-five (65) pages contain a full, true, and complete copy of the transcript of the proceedings had in the fifth district court for the parish of Orleans in a certain suit wherein E. A. Switzer was plaintiff and the Steamboat Frolic & owners, Mary Heinn & husband, E. E. Norton, assignee of Mr. & Mrs. Heinn, were defendants, and also of all the proceedings had in this supreme court on the appeal taken by said defendants, which said transcript of appeal is now on the files of this honorable court under No. 3111.

In testimony whereof I have hereunto set my hand and affixed
67 the seal of this honorable court, at the city of New Orleans, this 5th day of October, anno Domini 1874, and in the ninety-ninth year of the Independence of the United States of America.

[SEAL.] M. P. JULIAN,
D'y Clerk.

John M. Howell, clerk, being absent.

68 To the Hon. John T. Lud'ling, chief-justice of the supreme court of the State of Louisiana:

The petition of Emory E. Norton, assignee of John Heinn and Mary Heinn, bankrupts under the acts of Congress of the United States, respectfully represents that a judgment has been rendered against petitioner by the name of E. E. Norton, in his said capacity, in the said supreme court of Louisiana, the same being the highest court of the State in which a decision could be had, at the suit of Edgar A. Switzer v. Steamboat Frolic, and Mary Heinn and John Heinn, owners, wherein was drawn in question the right, privilege, and immunity of your petitioner claimed under the Constitution and statutes of the United States, and authority exercised under laws of the United States, and said decision is against the title, right, privilege, and immunity specially set up and claimed under said Constitution, statute, and authority, and petitioner feels aggrieved by said judgment and desires that a writ of error may be allowed him to the Supreme Court of the United States, and tenders his bond with security according to law.

Wherefore petitioner prays that his bond be approved and that a writ of error from the Supreme Court of the United States, with a su-
69 persedeas, may be allowed petitioner, and for general relief.

A. G. BRICE & RACE, FOSTER, & E. T. MERRICK,
Attys.

Allowed:

JNO. T. LUDELING,
Chief-Justice S. Court of Louisiana.

(Indorsed:) Edgar A. Switzer vs. Steamboat Frolic and owners Emory E. Norton, assignee. Petition for a writ of error. Race, Foster & E. T. Merrick, of counsel. Supreme court. Filed May 30th, 1874 M. P. Julian, d'y clk.

70 Know all men by these presents that we, Emory S. Norton, assignee of John & Mary Hien, bankrupts, as principal, and L. Zeller & A. G. Brice, as sureties, are held and firmly bound unto Edgar A. Switzer in the full and just sum of two hundred & fifty dollars, to be paid to the said Edgar A. Switzer, his certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the supreme court of the State of Louisiana, in a suit depending in said court wherein said Edgar A. Switzer was plaintiff and said Norton, assignee, defendant, judgment was rendered against the said Norton, assignee, defendant, and the said Emory E. Norton, assignee of said bankrupts, Mary & John Heinn, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. A. Switzer, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Emory E. Norton, assignee as aforesaid, shall prosecute his writ to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

E. E. NORTON, *Assignee*,
By RACE, FOSTER, & E. T. MERRICK, *his Atty's.* [L. S.]
L. ZELLER. [L. S.]
A. G. BRICE. [L. S.]

Sealed and delivered in the presence of—

71 (Indorsed:) United States circuit court. No. 3111. Emory E. Norton, plaintiff in error, vs. Edgar A. Switzer. Bond for writ of error, filed May 30th 1874. M. P. Julian, d'y clerk.

L. Zeller & A. G. Brice, being first duly sworn, say the' resides in the city of New Orleans, State of Louisiana, that 'he' signed the within bond as security, and that 'he' *is* worth more than the amount thereof over and above all *his* liabilities.

L. ZELLER.
A. G. BRICE.

Sworn to and subscribed before me this thirtieth day of May, A. D. 1874.

JNO. M. HOWELL,
Clerk Sup. Court.

Approved:

JNO. T. LUDELING,
Chief-Justice S. Court.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the *of the* supreme court of the State of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Edgar A. Switzer and Emory E. Norton, as assignee of John Heinn and Mary Heinn, bankrupts, under the acts of Congress of the United States, wherein was drawn in question the validity of a statute of the United States, and the decision was against its validity, and wherein was also drawn in question a right, privilege, and immunity claimed under the Constitution and the statutes of the United States, and authority exercised under the United States, and the said decision is against the authority, right, privilege, and immunity specially set up and claimed by said Emory E. Norton, assignee as aforesaid, under such Constitution statutes of the United States, and authority, a manifest error hath happened, to the great damage of the said Emory E. Norton, assignee of John Heinn & Mary Heinn, bankrupts under the acts of Congress of the United States, and as such assignee, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 30th day of May, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

Allowed.

JNO. T. LUDELING,
Chief-Justice S. Court of La.

(Indorsed:) United States circuit court. No. . Emory E. Norton, assignee, pltff. in error, versus Edgar A. Switzer, defendant in error. Writ of error. Supreme court. Filed May 30th, 1874, M. P. Julian, d'y clk.

73 THE UNITED STATES OF AMERICA:

The President of the United States to Edgar A. Switzer, greeting

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, at New Orleans, wherein Emory E. Norton, assignee of John Heinn and Mary Heinn,

bankrupts under the acts of Congress, is plaintiff in error and you are defendant, to show cause, if any there be, why the judgment rendered against the said Norton, assignee, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John T. Lud'ling, chief justice of the supreme court of the State of Louisiana, this 30th day of May, in the year of our Lord one thousand eight hundred and seventy-four.

JNO. T. LUDELING,
Chief-Justice of the Supreme Court of Louisiana.

74 (Indorsed:) No. . E. B. Norton, assignee, pltff. in error, vs. Edgar A. Switzer, deft. in error. Citation.

Sheriff's return.

Received, June 1st, 1874, by the sheriff of the parish of Orleans, and on the first day of June, 1874, served a copy of the within citation in error on Edgar A. Switzer, defendant in error, by handing the same to him in person, at his office, No. 124 Gravier st., in this city.

FRANK PFISTER, *D'y Shff.*

Ret. same day.

On this 2d day of June, 1874, personally appeared before me the subscriber, Frank Pfister, a deputy sheriff for the parish of Orleans, who makes oath that he delivered a copy of the within citation in error on Edgar A. Switzer, as stated in his official return hereon.

FRANK PFISTER.

Sworn to and subscribed before me this 2nd day of June, A. D. 1874.

M. T. JULIAN,
D'y Clerk, Sup. Court.

(Indorsement on cover:) No. 105. Emory E. Norton, assignee of John Heinn and Mary Heinn, bankrupts, vs. Edgar A. Switzer, plaintiff in error. Louisiana, sup. ct. Filed 9th October, 1874.

Supreme Court of the United States.

No. 105.

EMORY E. NORTON, Assignee of John Heinn and Mary Heinn, Bankrupts, Plaintiff in Error.

vs.

EDGAR A. SWITZER, Defendant in Error.

The original action in this case was instituted by Edgar A. Switzer against the steamboat Frolic and owners and John and Mary Heinn, in the *State Court* for the second judicial district, December 13, 1866.

After seizure the property was bonded. (Rec., p. 4.)

In October, 1870, the case, for some reason, was removed to the Fifth District Court.

The suit against the boat was "for services as captain and superintendent of the repairing of steamboat Frolic, from 9th March, 1865, to 6th March, 1866—say two months and twenty-seven days—$870." (Rec., p. 2.)

A supplemental petition was filed 26th December, 1866, alleging that John Heinn had acknowledged the services by giving a note payable at four months for $800, as an acknowledgment of services as captain and superintendent of the repairs of the steamboat Frolic, as stated in the bill annexed to original petition—prayer for a privilege on "steamboat" Frolic. After being cited to answer supplemental petition, defendants excepted by pleading novation of original debt. This exception was dismissed as an exception, but was renewed in the separate answers of Mary and John Heinn. (Rec., 8 and 9.) Subsequently, defendants

plead that the case is one in admiralty, and the United States courts have exclusive jurisdiction. (Rec., 12.)

The exceptions were maintained, and a rule for a new trial was taken. (Rec., p. 14.) The motion for a new trial was (February 20, 1868,) continued indefinitely, (p. 15,) and the same continued March 25, 1868. (P. 15.)

On the seventh of April, 1868, the first order respecting the plaintiff in error, the motion for a new trial, still undisposed of, was made. It is in these words:

"On motion of B. Eagan, attorney for plaintiff, and on suggesting to the court that since the institution of this suit Mrs. Heim and her husband, John Heim, the defendants, have taken the benefit of the bankrupt act, and that E. E. Norton was appointed and qualified as their assignee.

"Therefore it is ordered by the court that E. E. Norton, Esq., assignee of said defendants, be made a party in this suit in his capacity aforesaid in place and stead of defendants." (Rec., p. 15)

There is no amendment or any *pleading* making Norton a party. The above is all.

The motion was served April 8, 1870, and an *ordinary citation* was also served, calling on E. E. Norton to answer a petition in ten days. No answer was filed on the 22d day of April, the ten clear days, but plaintiff was not bound to plead until two days after a judgment by default should be taken against him. (C. P., 310, 312, 314, 606; No. 4, 608.)

In the absence of the plaintiff in error, E. E. Norton, and of Heim and wife, motion for a new trial still being undisposed of, the following judgment was entered *ex parte* against Norton, in these words:

"It is ordered, adjudged, and decreed that the plaintiff, E. A. Switzer, recover of E. E. Norton, assignee of the defendants, Mary Heim and her husband, John Heim, the sum of eight hundred and seventy dollars, with legal interest from 6th March, 1866, until paid, and costs of suit, with privilege on the 'steamboat' Frolic." Rec., p. 17.)

This judgment was affirmed by the Supreme Court of Louisiana.

Among other things, it said:

"It is contended, however, that the decree of bankruptcy divested the court of jurisdiction, and that it had no authority to proceed to trial and render judgment against the assignee; that the plaintiff should have gone into bankruptcy to enforce his claim.

"The State, having obtained lawful jurisdiction over the parties and subject-matter, could not be divested thereof by the bankrupt court." (Rec., p. 20.)

A petition for a rehearing (which forms a part of the pleadings) was filed, setting forth the errors of the State court more fully.

The judgment was in itself the most irregular, because, under the universal practice and the explicit provisions of the code, Norton was entitled to have the motion for a new trial disposed of, which never was done, before being called upon to answer to the action, and when that was done the case should have been fixed for trial. (C. P., 463, 470, 476.) This gross error is not a question in the national court, but it negatives all presumptions of consent to State jurisdiction on the part of the plaintiff in error.

Assignment of Errors.

The Fifth District Court of New Orleans, being a State court, was without any authority or jurisdiction over the said plaintiff in error, holding his office as such assignee in bankruptcy and performing the duties thereof under the laws of the United States, to render aid judgment against him as assignee of said John and Mary Heinn, bankrupts, for the said sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, until paid and costs of suit, with privilege on the steamboat Frolic; and said judgment and proceedings of said Fifth District Court and the final judgment of the Supreme Court of Louisiana affirming the same are in contravention of and violate the laws of the United States and the rights of the plaintiff in error under them, and the said judgments and proceeding are against the acts of Congress of the United

States, commonly called bankrupt acts, and especially against sections 1, 2, and 21 of said act of Congress approved 2d March, 1867, and said judgment and proceedings against the plaintiff in error are erroneous, and the said judgment of the Supreme Court of Louisiana against him ought to be reversed.

2d. The said judgment was also erroneous for this, that the said claim of the said defendant in error against the said steamboat Frolic for a privilege thereon as captain and superintendent was a claim pertaining exclusively to the admiralty jurisdiction of the United States, and the said second judicial District Court in and for the parish of Jefferson and the Fifth District Court of the parish of Orleans were without jurisdiction or authority to take cognizance of the same.

ARGUMENT.

1. This is the first case which has come to the knowledge of counsel where the attempt has been made to obtain a judgment *in personam* against the assignee for a debt due by the bankrupts.

The law of the case is the bankrupt act, before it was incorporated into the Revised Statutes.

The *twenty-first section* of the bankrupt act of the United States has provided in express terms how the State courts may retain jurisdiction of cases of this kind. Section 5106 is substantially the same. (Rev. Stats., sec. 5106.)

The suit, then, is to be prosecuted against *the debtor*, *the bankrupt*.

"And no creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or *in* equity therefor against the bankrupt until the question of discharge shall have been determined." * * * "And provided also, that if the amount due the creditor is in dispute, the suit, *by leave of the court* in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount *may be proved* in bankruptcy, but execution shall be stayed as aforesaid."

(See Bump, 6th ed, p. 435; see also section 5106, Bump, 8th ed., p. 599.)

It is therefore very clear that the mode of proceeding, where judgment is to be rendered in the State court, is against *the bankrupt*. The assignee does not represent the bankrupt. It would be unreasonable to substitute the assignee in his place, for it would place a person ignorant of all the defenses to an action in the place of the party who had incurred the obligation, and who of all others would be best capable of making the defense.

What do we see in this case? All proceedings are abandoned. A new party, by a new proceeding,) the equivalent of a new suit,) is called in to stand in the place and stead of the bankrupt.

The law has nowhere conferred on the assignee in bankruptcy authority to approve, consent to, or stand in judgment in any case for *a debt* provable in bankruptcy. The only class of cases in which he may at his option appear in a State court is one in which he claims that property shall be delivered to him or in which property is sought to be withheld from him.

It is impossible to read the bankrupt act, and the rules provided by this court to enforce it, and come to any other conclusion; and any other practice would introduce infinite confusion into the proceedings under the bankrupt act. If Congress had intended that actions of debt *in personam* could be brought against the assignee it would not have so sedulously provided the other modes, and authorized this court to prescribe the forms for proving debts against the bankrupt.

The mode of proceeding is prescribed by Rules in Bankruptcy, No. XXXIV. See also forms Nos. 21 to 25, for the proof of debts.

The Constitution of the United States, in authorizing Congress to establish "*uniform laws on the subject of bankruptcies throughout* the United States," of necessity supersedes all State laws, and there can be no other laws on any subject of bankruptcy than those prescribed by Congress.

One question is, does the twenty-first section of the bankrupt act prescribe the mode of proceeding in a case like this? If it does, then no other and different mode of proceeding can be adopted.

A bare inspection of the section shows that the act has provided another mode. *The creditor is not allowed to prosecute* such a suit, either at law or in equity, *to final judgment*, but may, by leave of the bankrupt court, proceed to judgment with stay of execution. But such judgment must be against the *bankrupts themselves*.

There is, therefore, no provision in the act for a judgment against the assignee for a debt due by the bankrupt. The only power conferred on the assignee is to collect the assets. The legal title *to property* vests in the assignee, and, so far as the property is concerned, he may stand in judgment at his option in the State or National courts. (Sec. 14, Bankrupt Act.) But he has no power conferred on him to acknowledge the indebtedness of the bankrupts and bind the creditors and other parties by making default or otherwise.

Such power would lead to great abuses and confusion. Congress has, therefore, under the exclusive power under the Constitution, made special provision as to the proof of debts, and the uniformity mentioned in the Constitution, already cited, will not tolerate any other mode. (See secs. 19 to 22, inclusive, of the act.) The rules prescribed by the Supreme Court, under the 10th section, show the necessity of obedience to the rules. (See sec. 10.)

If a State court can render a judgment against an assignee when he has not sought its jurisdiction, it can enforce the judgment, not only for the costs but the main demand. It is to prevent this condition of things that section 21 was enacted. (See also secs. 1 and 2.)

The exception that the case, being *in rem* as to the steamboat, belongs to the admiralty jurisdiction, is found on page 12 of printed record. The exception was necessarily overruled in order to render the judgment. The claim of the captain for wages against the boat brings the case within

the admiralty jurisdiction. It is alleged that the steamboat is engaged for carrying freight and passengers for hire, and the petition prays for a privilege on the boat. (Pp. 1 and 2.) The case seems to be clearly within the ruling of this court in the case of Moses Taylor, 4 Wallace, 411.

We pray for a reversal of the judgment on both grounds assigned as error.

E. T. MERRICK,
G. W. RACE,
Attorneys and Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 105.

EMORY E. NORTON, Assignee, &c., Plaintiff,

vs.

EDGAR A. SWITZER, Defendant in Error.

Supplemental Brief.

The first brief in this case was prepared with much haste, in order to bring the case within the rules of the court.

The writ of error is to the Supreme Court of Louisiana.

The original proceeding was against the steamboat Frolic and owners, Heinn and her husband, under a process known as a provisional seizure under the law of Louisiana. (Rec., 1 and 2.)

The Code of Practice provides, for provisional seizure, sec. 3 of art. 285:

"When a seaman or another person employed on board of a ship or water-craft navigating within the State, or persons having furnished materials for or made repairs to such ship or water-craft, prays that the same may be seized and prevented from departing until he has been paid the amount of the claim"—

(C. P., Art., 289)—

"Sailors or other persons employed on board of any ship or vessel or other water-craft trading within the State, as well as persons who have furnished materials for or made repairs to such vessels or crafts—may, at the same time they bring their actions against the captain, master, or consignees of such vessels or crafts for the amount due to them, obtain a provisional seizure of such vessels or crafts to secure the amount of their claims, provided they state on oath, at the foot of their petition, that the sum sued for (specifying the amount of the same) is really owing; that such vessels or crafts are on the eve of leaving the juris-

diction of the court, and that they are apprehensive of losing the amount they claim should such vessels or crafts depart previous to their demand having been satisfied."

"Such seizure may be made even of ships or vessels trading out of the State at the suit of persons claiming payment for materials furnished for or repairs made upon such ship or vessel."

We concede the master of a vessel has no maritime lien. But here the pleadings show that the claim is more in the nature of services for repairs, &c., than as master.

The suit is brought against "the Steamboat Frolic and owners and Mary Heinn and husband, John Heinn," and is so entitled. (Rec., p. 1.)

The prayer is that a writ of provisional seizure do issue against the steamboat Frolic, &c. (P. 2.)

The Supreme Court of Louisiana place this part of the case on the ground that the suit was for wages as captain, and bases its opinion on the case of Leon *v.* Galceran, 11 Wall., 185. It seems to us the nature of the proceeding, as the pleadings show, is both *in rem* and *personam*. But as we rely mainly on the first assignment of error, we will only cite the case of the Belfast, 7 Wall., 624, in addition to the Moses Taylor case, 4 Wall., 411, on this point.

It is proper to observe that it appears clearly from the opinion of the Supreme Court it passed upon the question of admiralty jurisdiction, as well as the right of the State tribunal to cite in the assignee and make him stand in judgment as such in the place of the bankrupt. (Rec., p. 19.)

The petition for a rehearing, which forms part of the pleadings, also expressly makes the question as to the right of the State court to take judgment in such case against the assignee and inferentially as to the right to take jurisdiction of the suit.

The Code of Practice requires as follows:

"ART. 909. The Supreme Court shall state the reasons of its judgments, citing as exactly as possible the laws on which it founds its opinion. When the judges are all of the same opinion, it shall be sufficient that one of the

number pronounce the judgment; but if there be a division between them, they shall declare their opinions separately.

"ART. 912. In the interval between the day on which the judgment is rendered and that on which it becomes final, a party dissatisfied with the judgment may apply to the court for a new hearing in the cause, and for this purpose shall present *a petition*, in which he shall state substantially the reasons for which he thinks the judgment erroneous, and shall cite the authorities in support of his opinion."

See Stewart *v.* Kahn, 11 Wall., 493.

It will be recollected, as stated in our original brief, that the property was bonded. *There was therefore no question of property in the case.*

Articles of Code of Practice referred to on the point that nothing can be presumed against Norton for not answering, because no default was taken against him:

C. P., Art. 310: "If the defendant do not appear, either in person or by his advocate, after the delay provided by law, the plaintiff may take a judgment by default against him."

Art. 12: "If, two days after this first judgment has been rendered, the defendant neither appear nor file his answer, definite judgment will then be given for the plaintiff, provided he prove his demand. This proof is required in all cases."

Art. 14: "If the defendant, on the very day when a definitive judgment by default was to have been rendered against him, appear and file his answer, the first judgment shall be set aside."

Had there been a default against Norton making him a party, then the case should have been set down on the original issues.

Art. 463: "As soon as the answer has been filed in a suit the clerk shall set down the cause on the docket of the court in order that it may be called in its turn, and *a day fixed for its trial* in the manner prescribed by special laws and the rules of the respective courts." (See also arts. 470, 476.)

On the main question, whether the *assignee* in bankruptcy can be cited into the tate courts against his will and be made to stand in judgment "in the place and stead" of *the bankrupt debtors*, we find the following authorities, which go somewhat further than is needed for our case:

In re Cook and Gleason, 3 Bissel, 119.

In re Ernest Sacchi, a bankrupt, 10 Blatchford R., 29.

In re Geo. W. Anderson, 9 Bankrupt Register R., 360.

The Supreme Court of Louisiana, in quoting from Bump on Bankruptcy, we think, confound cases where there is property in controversy between the assignee, who is invested with the title of the bankrupts, and third persons with the cases expressly provided for by the act of Congress, and wh re the suit can only be prosecuted against *the bankrupt* by leave of the bankrupt court. (Rev. Stat., 5106, 6th ed.; Bump on Bankruptcy, sec. 21, p. 435; Rev. Stat., 4972, 4979, secs. 1 and 2, Bankrupt Law, 6th ed.; Bump, 277, 297.)

The question is one of construction of the act of Congress, and is of considerable importance to the profession. If it be law that parties may cite the assignee into the State court in the place and stead of the bankrupt, and obtain judgments against him, instead of pursuing the course provided by the act of Congress and the rules prescribed by this court, the uniformity of the laws is gone, and, as we have said, great vexation and cost will be introduced and incurred. The time of the assignee will be taken up in going from court to court; counsel must be employed, costs must be paid; and other vexations may easily be imagined.

We cannot think that this novel practice is at all in conformity with the laws of the United States.

E. T. MERRICK &
G. W. RACE,
For Plaintiff in Error.